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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

DOCKET NUMBER _____

COMMONWEALTH OF PENNSYLVANIA,
Respondent

vs.

PHILIP D. LEHMAN,
Petitioner

ON WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. WHETHER THE PETITIONER'S SIXTH AMENDMENT RIGHT TO COUNSEL WAS VIOLATED UNDER THE UNITED STATES CONSTITUTION AS TO WHETHER THE PETITIONER WAS CONSULTED ADEQUATELY BY TRIAL COUNSEL AS TO WHETHER HE SHOULD TESTIFY OR NOT.

B. WHETHER THE PETITIONER'S SIXTH AMENDMENT RIGHT TO COUNSEL UNDER THE UNITED STATES CONSTITUTION WAS VIOLATED WHEN HIS TRIAL COUNSEL DECIDED NOT TO CALL CHARACTER WITNESS ON HIS BEHALF.

STATEMENT OF THE CASE

On March 6, 1985, the Petitioner went to the V.F.W. located in Spring Grove, York County, Pennsylvania. As a result of his behavior the Petitioner was asked to leave by the owners of the V.F.W. Later that evening a fight occurred between the petitioner and William Neail. The petitioner then shot the victim with a .22 caliber pistol. At the time of the incident the petitioner was intoxicated.

PROCEDURAL HISTORY

On September 20, 19[illegible], the petitioner was convicted by a jury of attempted voluntary manslaughter. On September 30, 1985, the petitioner's trial counsel, Scott L. Kelly, Esquire filed post-verdict motions in arrest of judgment and for a new trial. On October 22, 1986 the petitioner's post-verdict motions were denied.

On December 5, 1986, William C. Costopoulos, Esquire filed a motion for a new trial on the basis of ineffective assistance of counsel. On February 19, 1987 following an evidentiary hearing held on December 29, 1987, the trial judge denied the petitioner's motion. On March 2, 1987, the petitioner was sentenced to 2 to 4 years and fined $5,000.

On March 31, 1987, the petitioner filed a notice of appeal to the Pennsylvania Superior Court. On October 15, 1987 the Superior Court of Pennsylvania denied the petitioner's appeal. The Pennsylvania Supreme Court denied the petitioner's petition for allowance of appeal. The petitioner now files a Petition for Writ of Certiorari with this Honorable Court.

ARGUMENT

I. THE PENNSYLVANIA SUPERIOR COURT PROPERLY AFFIRMED THE TRIAL COURTS DECISION THAT THE PETITIONER'S SIXTH AMENDMENT RIGHT TO COUNSEL UNDER WAS NOT VIOLATED SINCE THE PETITIONER WAS ADEQUATELY CONSULTED WITH THE PETITIONER OVER THE DECISION NOT TO TESTIFY AT TRIAL.

In a Post-Conviction Hearing Act hearing, the petitioner has the burden of establishing that his/her trial counsel was ineffective. Commonwealth v. Bradford, 339 Pa. Super. 215, 408 A.2d 628 (1986); Commonwealth v. West, 336 Pa. Super. 180, 495 A.2d 440 (1982); Commonwealth v. Shore, 487 Pa. 534, 410 A.2d 740 (1980). In reviewing a claim for ineffectiveness assistance of trial counsel the following analysis must be used. First it must be determine whether the issues underlying the charge of ineffectiveness is of arguable merit. Commonwealth v. Stoyko, 504 Pa. 455, 475 A.2d

714 (1984); Commonwealth v. Wade, 501 Pa. 331, 461 A.2d 613 (1983); Commonwealth v. Hubbard, 472 Pa. 259, 372 A.2d 687 (1977).

If it is determined that the charge of ineffectiveness is of arguable merit, the court must determine whether the course chosen by counsel has some reasonable basis designed to serve the interest of his client. Commonwealth v. Buehl, 518 Pa. 366, 508 A.2d 1167 (1986); Commonwealth ex rel Washington v. Maroney, 427 Pa. 599, 235 A.2d 344 (1967). Finally the petitioner must show that he was prejudiced by trial counsel ineffectiveness. Commonwealth v. Pierce, ____ Pa. ____, 527 A.2d 973 (1987).

The petitioner argues that his trial counsel was ineffective for not calling him as a witness. The petitioner testified at the evidentiary hearing that he did want to testify at trial, but that trial counsel told him not to

because the petitioner was not ready. However trial counsel on the other hand testified that the petitioner did not recall the circumstances surrounding the incident (P.C.H.A. Hr. 13).

The trial judge specifically found the petitioner's testimony to be lacking in credibility. At trial out of the presence of the jury, the trial judge interrogated the petitioner concerning the indication from his attorney that the petitioner was not going to testify. In this colloquy, the trial judge determined that the petitioner understood that it was his right to testify and that it was his decision not to testify. The petitioner understood this and decided not to testify.

The petitioner during the P.C.H.A. Hearing testified that he did not remember whether he discussed with the judge whether or not they had this conversation. Therefore the trial court

properly determined that the petitioner's testimony was lacking credibility, see Commonwealth v. Abbruzzese, 293 Pa. Super. 246, 438 A.2d 977 (1981). Therefore, the trial court was correct in its resolving the issues of credibility and the petitioner then properly advised as to whether he should testify or not.

II. THE PENNSYLVANIA SUPERIOR COURT PROPERLY AFFIRMED THE TRIAL COURT'S DENIAL THAT THE PETITIONER'S SIXTH AMENDMENT RIGHT TO COUNSEL WAS NOT VIOLATED WHEN THE PETITIONER'S TRIAL COUNEL FAILED TO CALL CHARACTER WITNESSES.

The petitioner next argues that the petitioner's trial counsel was ineffective for failing to call any character witnesses.

In order to prevail on this claim, the petitioner must show that both the witnesses were available and willing to testify. Commonwealth v. Burrell, 286 Pa. Super. 502, 429 A.2d 434 (1981). Secondly, the petitioner must show that their testimony would have been

helpful to his defense. Commonwealth v. Wallace, 347 Pa. Super. 248, 500 A.2d 816 (1985).

The petitioner did testify to names of certain witnesses but he did not show that these witnesses would be willing to testify not did he present any evidence as to what testimony these witnesses would offer.

Furthermore, the appellant cannot prevail on a ineffectiveness claim involving trial strategy unless he shows that the alternatives not chosen offered a potential for success substantially greater than the tactics actually utilized. Commonwealth v. Turner, 469 Pa. 319, 365 A.2d 847 (1977).

The petitioner's trial counsel testified that these character witnesses would add nothing to the petitioner's defense. Also trial counsel was concerning that these witnesses would be cross-examined concerning their prior knowledge

of the petitioner's prior conviction on a simple assault charge (N.T. P.C.H.A. 20-21).

Therefore, the presentation did not offer a potential for success substantially greater than the decision not to do so. Therefore the trial court was correct in their ruling.

CONCLUSION

The petitioner's sixth amendment right to counsel was not violated under United States constitution since the petitioner's trial counsel did consult with the petitioner over his decision to testify. The petitioner's sixth amendment right to counsel was not violated under the Unites States constitition when petitioner's trial counsel did not call character witnesses since these character witnesses would have been aware of crimes of force which the petitioner had committed in the past.

RESPECTFULLY SUBMITTED,

H. Stanley Rebert, Esquire
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Counsel for Commonwealth

IN THE SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF PENNSYLVANIA	:	NO._____
	:	
VS.	:	
	:	
PHILIP D. LEHMAN	:	

PROOF OF SERVICE

I, H. Stanley Rebert, Attorney for the Respondent, the Commonwealth of Pennsylvania, hereby certify that I have on the 28th day of July, 1988, served the Commonwealth's Brief by first class mail, postage prepaid to Office of the Clerk, Supreme Court of the United States, Washington, D.C. 20543.

Respectfully submitted,

H. Stanley Rebert, Esquire
District Attorney
Attorney I.D. #15321

COMMONWEALTH OF PENNSYLVANIA : NO._____

VS. :

PHILIP D. LEHMAN :

PROOF OF SERVICE

I, H. Stanley Rebert, Attorney for the Respondent, the Commonwealth of Pennsylvania, hereby certify that I have on the 28th day of July, 1988, served the Commonwealth's Brief by first class mail, postage prepaid to William C. Costopoulos, Esquire, 831 Market Street, P.O. Box 222, Lemoyne, Pennsylvania 17043.

Respectfully submitted,

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